Morgan a/l Perumal v K/I Hussein bin Abdul Majid & Ors

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J-05-51 OF 1996
SHAIK DAUD, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
20 JANUARY 1997

Criminal Law *— Public order and prevention of crime — Detention order — Deputy Minister did not apply his mind to particular circumstances of the case — Detention order issued two years after criminal activities — Whether detention order was valid — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)*

The appellant was arrested by the first respondent under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). By a subsequent order, the Deputy Minister for Home Affairs acted under s 4(1) of the Ordinance and ordered the appellant to be detained for a period of two years. The appellant then applied to the High Court for a writ of habeas corpus for his release which application was dismissed. The appellant appealed. The main ground of the appeal was that the detention is invalid, in that on the face of it, the order is vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of the case or whether he had exercised his powers of detention mechanically.

The appellant also contended that there was a long delay or a large gap between the dates of the alleged criminal activities and the date of the detention order. The alleged criminal activities occurred from August 1993 until about April 1994 but the detention order was only issued in March 1996. There is, therefore, a gap of some two years. There was no explanation given for the delay and the appellant argued that this does not justify the making of the detention order.

Held, allowing the appeal and issuing habeas corpus:

The Deputy Minister must have only applied his mind to the first limb of s 4(1) of the Ordinance when he issued the order which stated that the appellant was being detained 'to prevent him from acting in any manner prejudicial to public order'. However, the allegations upon which the Deputy Minister based his order all unequivocally point to acts of violence and the use of dangerous weapons which clearly fall within the second limb of s 4(1) of the Ordinance. The deletion of the second limb in the detention order suggests that the Deputy Minister in this case had not applied his mind properly when he issued the detention order, in that he applied his mind to the first limb of s 4(1) of the Ordinance, while all the facts contained in the allegations were focused on the second limb. For this reason alone, this appeal ought to be allowed.

Generally, detention orders are issued based on past criminal activities but those activities must be proximate to the date of the detention order to justify its validity. In the present case, the criminal activities of the appellant were some two over years from the date of the detention order. In the absence of any explanation, they are far too remote to justify the detention (see pp 339G–H, 340D and H).

[Bahasa Malaysia summary

Perayu telah ditahan oleh penentang pertama di bawah Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ("Ordinan tersebut"). Melalui perintah yang berikutnya, Timbalan Menteri Hal Ehwal Dalam Negeri telah bertindak di bawah s 4(1) Ordinan tersebut dan memerintahkan supaya perayu tersebut ditahan untuk tempoh dua tahun. Perayu kemudiannya telah memohon kepada Mahkamah Tinggi untuk mendapatkan writ habeas corpus untuk pelepasannya, permohonan yang mana telah ditolak. Perayu telah merayu. Alasan utama rayuan tersebut adalah bahawa penahanan tersebut adalah tidak sah, iaitu menurut keadaannya, perintah tersebut tidak jelas mengenai sama ada Timbalan Menteri telah sebenarnya memikirkan keadaan-keadaan khusus kes tersebut atau sama ada beliau telah melaksanakan kuasa-kuasa penahanannya secara mekanikal.

Perayu juga menegaskan bahawa terdapatnya kelewatan yang agak lama atau suatu jangka masa yang agak panjang antara tarikh-tarikh aktiviti jenayah yang didakwa dan tarikh perintah penahanan tersebut. Aktiviti-aktiviti jenayah yang didakwa berlaku daripada bulan Ogos 1993 sehingga lebih kurang bulan April 1994 tetapi perintah penahanan tersebut telah hanya dikeluarkan pada bulan Mac 1996. Dengan itu, terdapat jangka masa lapang selama dua tahun. Tidak terdapat penjelasan yang diberikan bagi kelewatan tersebut dan perayu berhujah bahawa ini tidak mewajarkan pembuatan perintah penahanan tersebut.

Diputuskan, membenarkan rayuan tersebut dan mengeluarkan habeas corpus:

Timbalan Menteri pastinya telah hanya memikirkan bahagian pertama s 4(1) Ordinan tersebut ketika beliau mengeluarkan perintah tersebut yang menyatakan bahawa perayu telah ditahan 'bagi mencegah beliau daripada bertindak dengan mana-mana cara yang menjejaskan ketenteraman awam'. Walaubagaimanapun, dakwaan-dakwaan di atas yang mana Timbalan Menteri telah mengasaskan perintahnya kesemuanya dengan cara yang tidak meragukan menunjukkan kepada tindakan-tindakan keganasan dan penggunaan senjata berbahaya yang mana jelasnya terlingkung di dalam bahagian kedua s 4(1) Ordinan tersebut. Potongan bahagian kedua dalam perintah penahanan tersebut menyarankan bahawa Timbalan Menteri dalam kes ini telah tidak memikirkan dengan sewajarnya ketika beliau mengeluarkan

perintah penahanan tersebut, iaitu beliau telah memikirkan bahagian pertama s 4(1) Ordinan tersebut, sedangkan kesemua fakta-fakta yang terkandung di dalam dakwaan-dakwaan itu tertumpu pada bahagian kedua. Atas alasan ini sahaja, rayuan ini seharusnya dibenarkan.

Secara amnya, perintah-perintah penahanan dikeluarkan berdasarkan aktiviti-aktiviti jenayah yang lalu tetapi aktiviti-aktiviti itu mestilah berdekatan dengan tarikh perintah penahanan tersebut untuk mewajarkan keesahannya. Dalam kes ini, aktiviti-aktiviti jenayah perayu berlaku lebih kurang dua tahun lebih daripada tarikh perintah penahanan tersebut. Dalam ketiadaan sebarang penjelasan, ianya adalah terlalu jauh untuk mewajarkan penahanan tersebut (lihat ms 339G–H, 340D dan H).]

Notes

For a case on the Emergency (Public Order and Prevention of Crime) Ordinance (Malaysia) s 4(1), see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) para 334.

Cases referred to

Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lan and another application [1993] 3 MLJ 673 (refd)

Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals [1990] 2 MLJ 297 (refd)

PP v Koh Yoke Koon [1988] 2 MLJ 301 (refd)

Yeap Hock Seng @ Ah Seng v Minister for Home Affairs & Ors [1975] 2 MLJ 279 (refd)

Yip Hon Kit v Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638 (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)

Appeal from: Criminal Application No 44–5 of 1996 (High Court, Johor Bahru)

RR Mahendran (*RR Mahendran & Co*) for the appellant.
Mohamad Abazafree bin Mohd Abas (Federal Counsel) for the respondent.

Shaik Daud JCA (delivering judgment of the court): On 13 January 1996, at about 2.40am, the appellant was arrested by the first respondent purportedly under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (hereinafter referred to as 'the Ordinance'). He was arrested at the Sultanah Aminah Hospital while he was receiving treatment for injuries sustained in a road accident. Eventually by an order dated

12 March 1996, the Deputy Minister for Home Affairs, purportedly acting under s 4(1) of the Ordinance, ordered the appellant to be detained for a period of two years.

By a notice of motion dated 12 February 1996, the appellant applied to the Johor Bahru High Court for a writ of habeas corpus for his release which application was dismissed; hence this appeal.

The main ground of this appeal is that the detention is invalid, in that on the face of it, the order is vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of the case or whether he had exercised his powers of detention mechanically. Section 4(1) of the Ordinance provides that:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years.

On a true reading of s 4(1) above, it seems clear that there are two distinct limbs, namely:

(a) a person who has acted in any manner prejudicial to public order; and

(b) a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence.

It is clear that the legislature intended in s 4(1) of the Ordinance to confer power on the Minister to issue a detention order based on any of the above two grounds or for that matter, on both the grounds. It also seems clear to us that it was intended by legislature that there be a clear distinction between the first and the second limb of s 4(1) of the Ordinance. Mr Ranjit Singh, counsel for the appellant, submitted that if there appears to be any doubt as to the particular limb the Minister applied his mind to, or whether he applied his mind at all, the detainee must be given the benefit of the doubt. We agree with this submission. Our courts have consistently held that when it comes to interpreting powers of preventive detention, there is no room for giving these powers a liberal interpretation. When it comes to interpreting powers of preventive detention, it must be interpreted strictly.

In *PP v Koh Yoke Koon* [1988] 2 MLJ 301, Hashim Yeop A Sani CJ (as he then was) held that the law of preventive detention must be construed strictly and in the case of doubt the court should lean in favour of the subject.

In *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297, Hashim Yeop A Sani CJ (as he then was) delivering the judgment of the Supreme Court again emphasizes at p 299:

> We are fully conscious of the government's effort to combat the drug menace in this country. But there is a fundamental principle involved here. The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals are concerned, this is the most correct approach for the courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the courts in dealing with detention law.

In the light of these decisions, we now have to look as to whether the Deputy Minister had actually applied his mind to the particular circumstances of this case or whether he had exercised his powers mechanically as claimed by the appellant.

It is submitted on behalf of the appellant that the facts adduced in the allegations upon which the detention order was sought and made show that all of them involved acts of violence and the use of dangerous weapons.

Therefore, it seems clear that all these allegations fall squarely on the second limb of s 4(1) of the Ordinance. On our perusal of the allegations which formed the basis of the detention order, we agree that all of them involved acts of violence, for instance on 28 August 1993, the appellant was alleged to have been armed with an iron pipe and had attacked and injured an individual at a children's park. On 16 September 1993, he had allegedly physically attacked an individual at a pig farm. It cannot be gainsaid that all the allegations were acts of violence and the use of dangerous weapons. Therefore, they must fall squarely within the second limb of s 4(1) of the Ordinance. The order issued by the Deputy Minister in this case was in the following terms:

> Bahawasanya saya, berpuashati yang perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak menegah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudaratkan ketenteraman awam ... .

The second limb of the printed order was deliberately obliterated. Reading the order as stated above, it is obvious that the Deputy Minister must have only applied his mind to the first limb of s 4(1) of the Ordinance when he issued the order. On our reading of the order as stated above, it seems obvious to us that the appellant was being detained 'to prevent him from acting in any manner prejudicial to public order'. The allegations upon which the Deputy Minister based his order all unequivocally point to acts of violence and the use of dangerous weapons which clearly fall on the second limb of s 4(1) of the Ordinance. Can it, therefore, be said that the Deputy Minister properly applied his mind, as the learned senior federal counsel would have us to believe? We find no difficulty in holding that the deletion of the second limb in the detention order lends credence to the assertion that the Deputy Minister in this case had not applied his mind properly when he issued the detention order. He has, therefore, acted in a mechanical manner. In *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lan and another application* [1993] 3 MLJ 673, LC Vohrah J in delivering the judgment of the Supreme Court on the same issue concluded at p 678 thus:

> We would conclude by saying that in determining the propriety or legality of a detention order made under s 4(1) the satisfaction of the Minister has to be considered in the light of the limbs under which he acted. The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

In the present case, it is abundantly clear to us that the Minister applied his mind to the first limb of s 4(1) of the Ordinance, while all the facts contained in the allegations were focused on the second limb. For this reason alone, this appeal ought to be allowed.

It is also contended that there was a long delay or a large gap between the dates of the criminal activities alleged against the appellant and the date of the detention order. From the list of allegations upon which the Deputy Minister based the detention order, it would appear that all the alleged criminal activities occurred from August 1993 until about April 1994 but the detention order was only issued in March 1996. There is, therefore, a gap of some two years. No one sought to explain this long delay. While it is not disputed that generally detention orders are issued based on past criminal activities but those activities must be proximate to the date of the detention order to justify its validity. In *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs & Ors* [1975] 2 MLJ 279, there was a similar delay of some four and a half months. Abdoolcader J (as he then was) commented (at p 283) that:

> These past activities should, however, ordinarily be proximate in point of time to justify the detention order.

In *Yip Hon Kit v Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638, when the criminal activities alleged were in the years 1983 and 1984 while the detention order was issued in February 1986, Edgar Joseph Jr J (as he then was) at p 647 held that:

> Accordingly, I hold that the criminal activities alleged against the applicant are too remote in point of law to justify the making of the detention order.

In the present case, as mentioned earlier, the criminal activities of the appellant were some two over years from the date of the detention order. In the absence of any explanation, we would also hold that they are far too remote to justify the detention.

For the above reasons, we allowed the appeal, issued habeas corpus, and ordered the appellant to be released forthwith.

Appeal allowed. Habeas corpus issued and appellant ordered to be released.

Reported by David Lai